

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF DENTISTRY

In the Matter of the Proposed Amendments to
Permanent Rules Relating to Dental
Therapists and Advanced Dental Therapists,
Minnesota Rules Chapter 3100

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minnesota Rules, part 1400.2240, subpart 4. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge, dated October 3, 2011, in all respects.

In order to correct the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall either take the action recommended by the Administrative Law Judge, make different changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minnesota Statutes, section 14.15, subdivision 4.

If the agency chooses to take the action recommended by the Administrative Law Judge, or if the agency chooses to make other changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the *State Register*, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated this 11th day of October, 2011

s/Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

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The rules proposed to be amended concern the credentialing and practice of two new categories of licensure established by the Minnesota Legislature in 2009. The proposed rules would include dental therapists and advanced dental therapists under existing standards on licensure, reinstatement, examination conduct, nitrous oxide administration, disciplinary action and professional development.

Administrative Law Judge Eric L. Lipman of the Office of Administrative Hearings conducted a hearing on August 5, 2011. The hearing commenced at 9:00 a.m., in the 4th Floor Conference Room, University Park Plaza, 2829 University Avenue Southeast, Minneapolis, Minnesota 55414-3251.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may make after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.¹

David A. Linde, D.D.S., of the Minnesota Board of Dentistry (Board), appeared at the rule hearing on behalf of the Board. Also present on behalf of the Board were Candace Messing, D.D.S., Nancy Kearn, D.H., and Assistant Attorney General Daphne Lundstrom.

¹ See generally, Minn. Stat. §§ 14.05, 14.15 and 14.50.

Approximately 36 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. In addition to members of the agency panel, 20 members of the public made statements or asked questions at the hearing.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another 20 calendar days – until August 25, 2011 – to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Board an opportunity to reply to earlier-submitted comments. The hearing record closed on September 1, 2011.

SUMMARY OF CONCLUSIONS

With one exception listed below, the Board has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. The Board is charged with adopting rules for the conduct of its business and with making and publishing uniform rules for carrying out the provisions of Minnesota Statutes, Chapter 3100 governing the Board of Dentistry.²

2. With this rulemaking process, the Board seeks to amend numerous provisions of its rules relating to the credentialing and practice of dental therapists and advanced dental therapists.

3. The Board's purpose is to clarify the licensure requirements for dental therapists and advanced dental therapists. In addition, the Board used this rulemaking to respond to requests from certain licensees for greater clarity as to the permitted scope of practice for dental therapists and advanced dental therapists.³

² Minn. Stat. § 150A.04, subd. 5.

³ Exhibits D and F.

II. Procedural Requirements of Chapter 14

4. On December 13, 2010, the Board published in the *State Register* a Request for Comments seeking comments on its possible amendment to rules governing the regulation of dental therapists and advanced dental therapists.⁴

5. On May 11, 2011, the Board requested approval of its Dual Notice of Intent to Adopt Rules With or Without a Hearing and Additional Notice Plan.⁵

6. By letter dated May 20, 2011, Administrative Law Judge Manuel J. Cervantes approved the Board's Dual Notice and Additional Notice Plan.⁶

7. On May 26, 2011, the Board sent by U.S. mail a copy of the Dual Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.⁷

8. On May 26, 2011, the Board sent a copy of the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library as required by Minn. Stat. §§ 14.131 and 14.23.⁸

9. On May 26, 2011, the Board sent a copy of the Dual Notice, the SONAR and copy of proposed rules to certain legislative leaders as required by Minn. Stat. § 14.116.⁹

10. The Dual Notice of Intent to Adopt Rules, published in the June 6, 2011 issue of the *State Register*, set July 6, 2011 as the deadline for comments or to request a hearing.¹⁰

11. The Dual Notice identified the date and location of the hearing in this matter.¹¹

⁴ Ex. A.

⁵ See, Ex. H.

⁶ Ex. H.

⁷ Ex..G

⁸ Ex. E.

⁹ Ex. K.

¹⁰ Ex. F.

¹¹ Ex. K.

12. The Dual Notice included electronic links to the Revisor's draft of the rules, and related materials, along with instructions for obtaining copies of these documents from the Board.¹²

13. At the hearing on August 5, 2011, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Board's Request for Comments as published in the *State Register* on December 13, 2010.¹³
- b. the proposed rules dated April 18, 2011, including the Revisor's approval;¹⁴
- c. the Board's SONAR;¹⁵
- d. the Certificate of Mailing the SONAR to Legislative Reference Library on May 26, 2011;¹⁶
- e. the Dual Notice as mailed and as published in the *State Register* on June 6, 2011;¹⁷
- f. the Certificate of Mailing the Dual Notice to the rulemaking mailing list on May 26, 2011, and the Certificate of Accuracy of the Mailing List;¹⁸
- g. the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on May 26, 2011;¹⁹
- h. the written comments on the proposed rules that the Board received during the comment period that followed publication of the Dual Notice;²⁰

¹² *Id.*

¹³ Ex. A.

¹⁴ Ex. C.

¹⁵ Ex. D.

¹⁶ Ex. E.

¹⁷ Ex. F.

¹⁸ Ex. G.

¹⁹ Ex. H.

²⁰ Ex. I.

- i. the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on May 26, 2011;²¹ and,
- j. the Board's calculation of compliance-related costs.²²

III. Statutory Authority

14. The Board cites Minn. Stat. § 150A.04, subdivision 5, as its source of statutory authority for these proposed rules. This statutory provision grants the Board authority to adopt "rules as are necessary to carry out and make effective the provisions and purposes of sections 150A.01 to 150A.12, in accordance with Chapter 14."²³

15. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing the credentialing and practice of dental therapists and advanced dental therapists – licensed professions established by Minn. Stat. §§ 150A.105 and 150A.106.

IV. Impact on Farming Operations

16. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

17. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.

V. Additional Notice Requirements

18. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

19. On May 20, 2011, the Board provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings.²⁴

²¹ Ex. K-1.

²² Ex. K-2.

²³ Minn. Stat. § 150A.04, subd. 5; *see also* SONAR at 2.

²⁴ Ex. E.

- Beginning in August of 2009, the Board has undertaken monthly meeting to discuss with stakeholders methods of credentialing and regulating the practice of dental therapists and advanced dental therapists.
- The Board disseminated notice of these stakeholder meetings to regulated dental professionals and the general public. Furthermore, drafts of the proposed rules were distributed and discussed during these public meetings.
- The Board sent copies of its Request for Comments to the dental therapy programs of Normandale Community College and the University of Minnesota with the request that the Request be distributed to program students.
- In addition to the notice requirements set forth in Minn. Stat. Chapter 14, the Board posted rulemaking materials to its internet website.

20. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.

VI. Statutory Requirements for the SONAR

21. The Administrative Procedure Act obliges an agency adopting rules to address seven factors in its Statement of Need and Reasonableness.²⁵ Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable

²⁵ Minn. Stat. § 14.131.

categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

A. Regulatory Analysis

- (1) **A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

22. The Board states that the following groups will be affected by the proposed rules: dental therapists, advanced dental therapists and the members of the general public who receive treatment from these professionals

23. The Board asserts that the direct costs of obtaining and maintaining dental therapy credentials will be borne by the professionals applying for licensure. Further, the Board submits that its regulatory program strives to limit the practice to those who competently deliver care and to “obtain optimal results towards protecting the public.”²⁶

- (2) **The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

24. The Board states that with respect to administration costs it has received an appropriation from the Legislature that is sufficient to cover its program expenses.²⁷

- (3) **The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

25. The Board asserts that to the extent that the proposed regulations follow from the establishment of two new categories of professional licenses (see, 2009 Laws of Minnesota, Chapter 95, Article 3, Sections 24 and 25), the proposed regulations

²⁶ Ex. D at 1, 8 and 9.

²⁷ *Id.*, at 2.

represent the least costly and least intrusive methods of completing the certification and oversight functions delegated by the 2009 law.²⁸

- (4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.**

26. Because the Board and its stakeholders agreed that the least costly and least intrusive method of completing the certification and oversight functions delegated by the 2009 law was to broaden the Board's current rules wide enough to cover the newly-designated professional categories, no other methods were seriously considered by the Board.²⁹

- (5) The probable costs of complying with the proposed rules.**

27. The Board asserts that the costs of compliance with the proposed rules include: registration fees, reinstatement fees if a license is terminated and the costs of continuing education coursework.³⁰

- (6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

28. The Board contends that the consequence of not adopting the proposed rules is that the Board will be without an effective mechanism to credential or oversee dental therapists and advanced dental therapists.³¹

- (7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.**

29. The Board is unaware of any differences between the proposed rule changes and existing federal regulations.³²

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 3 - 4.

³² *Id.* at 4.

B. Performance-Based Regulation

30. The Administrative Procedure Act³³ also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.³⁴

31. In developing these rules, the Board has harmonized the requirements for the two new categories with the existing and familiar requirements for other oral health care providers. Across such topics as pre-licensure testing rules, records management and continuing education, the standards for dental therapists and advanced dental therapists are directly comparable to those that apply to other dental professionals.³⁵

C. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

32. The Board sought the assessment of Minnesota Management and Budget (MMB) on the proposed rules. As required by Minn. Stat. § 14.131, the Board sought the views of MMB and furnished it materials needed for a review.

33. By way of a letter dated October 3, 2011, MMB provided its review. Executive Budget Officer Lisa Barnidge concluded that "the proposed changes will not impose a cost on local governments."

34. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

35. Minn. Stat. § 14.127, requires the Board to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.³⁶

36. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city.³⁷

³³ Minn. Stat. § 14.131.

³⁴ Minn. Stat. § 14.002.

³⁵ Ex. D at 4 and 7 - 9.

³⁶ Minn. Stat. § 14.127, subds. 1 and 2.

³⁷ Ex. D at 6.

37. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

E. Adoption or Amendment of Local Ordinances

38. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.³⁸

39. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules.³⁹

40. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

VII. Rulemaking Legal Standards

41. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.⁴⁰

42. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,⁴¹ “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),⁴² and the agency’s interpretation of related statutes.⁴³

³⁸ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

³⁹ Ex. D at 6k.

⁴⁰ See, Minn. R. 1400.2100.

⁴¹ See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

⁴² Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁴³ See, *Mammenga v. Board of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

43. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁴⁴ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”⁴⁵

44. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.⁴⁶ Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁴⁷

45. Because the Administrative Law Judge has suggested a change to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

“the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;”

the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;” and

the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

46. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;”

whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;” and

⁴⁴ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁴⁵ See, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

⁴⁶ *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. App. 1999).

⁴⁷ *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

VIII. Rule by Rule Analysis

47. Most sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Board’s regulatory choice or otherwise requires closer examination.

48. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

49. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

3100.1170, Subpart 2 (C) - Resident Dental Therapist and Resident Dental Hygienist

50. So as to permit students studying dental therapy or dental hygiene to engage in “graduate or advanced educational clinical experience” as part of training for future licensure, the Board proposed the establishment of “resident dental therapist” and “resident dental hygienist” licensing categories.

51. Under the proposed rules, this interim licensure status would terminate “when the person is no longer an enrolled graduate student or student of an advanced dental education program approved by the board.”⁴⁸

52. Likewise important, the proposed rules provide that a covered licensee “must inform the board when the licensee is no longer an enrolled graduate student or student of an advanced dental education program approved by the board.” The regulatory penalty for failing to make these disclosures is that the Licensee will be “deemed to have committed fraud or deception within the meaning of Minnesota Statutes, section 150A.08, subdivision 1, clause 1.”⁴⁹

53. The difficulty is that the proposed regulation does not provide a time within which the disclosures must be made by the Licensee so as to avoid the Board deeming that he or she “committed fraud or deception”

⁴⁸ See, Ex. C at 2 (Revisor Draft 3991 – April 18, 2011).

⁴⁹ *Id.*, at 2 – 3.

54. Neither is it sufficient to say that the regulation will be read so as to insist upon disclosures within a “reasonable time.” The standards that the Board or its inspectors might use in making a determination as to when the disclosures are due are not stated, or a part of common understanding, so as to make the intended meaning clear.⁵⁰

55. Because proposed rule 3100.1170, subpart 2 (C) fails to provide reasonable notice of when the regulatory standards will apply, it is defective.⁵¹

56. One possible cure to this defect is to revise the proposed rule so as to read: “A person who fails to inform the board as required in item B, within thirty (30) days of no longer being enrolled as a student or graduate student in a program approved by the Board, is deemed to have committed fraud or deception within the meaning of Minnesota Statutes, section 150A.08, subdivision 1, clause 1.”

57. Modifying the proposed rules so as to specify a time within which required disclosures are due, is needed and reasonable and would not make a substantial change from the rules as they were originally proposed.

3100.9600 - Informed Consent

58. The Board proposed revising Minn. R. 3100.9600, subpart 9, as follows:

Informed consent. Dental records must include a notation that:

A. the dentist, advanced dental therapist or dental therapist discussed with the patient the treatment options and the prognosis, benefits, and risks of each; and

B. the patient has consented to the treatment chosen.

As the Board reasoned, because “obtaining informed consent from the patient prior to providing treatment still remains an important and necessary component of patient care and adequate recordkeeping,” the regulatory definition on informed consent needed to be expanded so as to include the newly denominated categories of oral health professionals.⁵²

⁵⁰ Compare, e.g., *In the Matter of the Proposed Rules Governing the Licensure of Treatment Programs for Chemical Abuse and Dependency and Detoxification Programs*, Minnesota Rules, Chapter 9530, OAH Docket No. 3-1800-15509-1 (2004) (“The Administrative Law Judge finds the requirement that a program have a particular licensure, and ‘any additional certifications required by the department,’ to be impermissibly vague and a defect in the rule”) (<http://www.oah.state.mn.us/aljBase/180015509.rr.htm>).

⁵¹ See, *In the Matter of Proposed Amendments to Rules Governing Apprenticeship Wages*, OAH Docket No. 7-1900-17022-1, slip op. at 36 (2006) (<http://www.oah.state.mn.us/aljBase/190017022.rr.htm>).

⁵² See, Ex. C at 12; Ex. D at 9.

59. For the reasons detailed in the accompanying Memorandum, the proposed rule implements the regulatory changes that the Minnesota Legislature made to Chapter 150A in 2009 (and thereafter), is within the authority of the Board to promulgate, and is needed and reasonable.

CONCLUSIONS

1. The Minnesota Board of Dentistry gave notice to interested persons in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted in Finding 55.

4. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion Number 3, as noted in Finding Number 56.

5. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness (SONAR) complied with Minn. R. 1400.2080, subp. 5.

6. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

7. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

8. Due to Conclusion Number 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except as otherwise noted.

Dated: October 3, 2011

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digital Recording; No Transcript

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit the final version to the Revisor of Statutes for a review as to its form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review the same and file them with the Secretary of State. When the final rules are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

MEMORANDUM

The overwhelming majority of the comments received on these rules – both during the public hearing and the comment periods that followed – were directed at the informed consent provisions of proposed Minn. R. 3100.9600, subpart 9.

Proponents of the new rule asserted that the proposed text was carefully drafted and is needed to implement the changes to dental practice made by the Minnesota Legislature in 2009 and 2011.⁵³

The critics of the proposed rule contend that because dental therapists and advanced dental therapists do not possess the training necessary to identify a wide enough range of medical risks associated with oral health procedures, these professionals cannot detail the “prognosis, benefits, and risks of each treatment” as required by the new rule. Many commentators argued that dental therapists or advanced dental therapists are simply not equipped to obtain informed consent from their patients. The comments of the Minnesota Dental Association are emblematic of the critiques submitted by opponents of the proposed rule. It argued:

Nothing in Chapter 150A authorizes advanced dental therapists or dental therapists to make the diagnosis required for obtaining informed consent. By statute, only dentists can diagnose patients. Minn. Stat. § 150A.05, subd. 1(1), (4) and (6). Other allied dental personnel are prohibited from diagnosing patients and establishing treatment plans....

....

The informed consent requirement, both under the common law and by rule, requires a “diagnosis” and nothing less. Quite simply, Chapter 150A contains no statutory provision that would allow the Board to adopt a rule enlarging dental therapy practice to include diagnosis, even those with a “limited” scope. Without statutory authority to make an independent diagnosis, neither dental therapists nor advanced dental therapists may obtain informed consent.⁵⁴

In the view of the Administrative Law Judge, the proponents of the rule have the better of the two arguments. This is because the statutory changes made in 2009 sharply defined minimum training requirements, scopes of practice and practice limitations for the new categories for licensure.⁵⁵ The Legislature has authorized dental therapists and advanced dental therapists to undertake particular health care

⁵³ See, e.g., Comments of Deputy Assistant Commissioner James I. Golden, PhD, Minnesota Department of Human Services (August 10, 2011); Comments of Jayne Cernohous, DDS (August 24, 2011); Comments of Craig W. Amundson, DDS (August 24, 2011).

⁵⁴ Comments of the Minnesota Dental Association, at 3 and 5 (August 25, 2011).

⁵⁵ See, e.g., Minn. Stat. §§ 150A.105, subds. (4) and (5), and 150A.106, subds. (1) – (4).

procedures and the proposed rule would permit them to obtain the patient's consent for the delivery of this care. To suggest otherwise reads the 2009 revisions out of the statute.⁵⁶

Likewise telling, the Minnesota Legislature has since considered a proposal to require precisely what the rule opponents urge in this proceeding – a mandate that a dentist develop an individual treatment plan and receive informed consent from a patient before a dental therapist performs services – but the Legislature has yet to revise Chapter 150A in this way.⁵⁷ Moreover, while this proposal was under consideration, the Legislature did make other changes to related provisions of the law: It established license fees for advanced dental therapists⁵⁸ and authorized reimbursement for the services provided by dental therapists and advanced dental therapists to those who are covered by Minnesota's medical assistance program.⁵⁹ Individually, and in combination, these events lead to the conclusion that the Minnesota Legislature intends that dental therapists and advanced dental therapists serve patients as described in Minn. Stat. §§ 150A.105 and 150A.106.

The proposed rule – Minn. R. 3100.9600, subpart 9 – conforms to the Legislature's delegation of authority and is needed and reasonable.

E. L. L.

⁵⁶ See, Minn. Stat. § 645.17 (1) ("In ascertaining the intention of the legislature the courts may be guided by the following presumptions ... the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.")

⁵⁷ See, Senate File 1201, Section 4 (2011); House File 1483, Section 4 (2011).

⁵⁸ See, 2011 Laws of Minnesota, 1st Spec. Sess., Chapter 9, Article V, Section 11.

⁵⁹ See, 2011 Laws of Minnesota, 1st Spec. Sess., Chapter 9, Article VI, Section 58.